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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

CORY SPENCER, an individual; DIANA MILENA REED, an individual; and COASTAL PROTECTION RANGERS, INC., a California non-profit public benefit corporation,

Plaintiffs,

vs.

LUNADA BAY BOYS; THE INDIVIDUAL MEMBERS OF THE LUNADA BAY BOYS, including but not limited to SANG LEE, BRANT BLAKEMAN, ALAN JOHNSTON AKA JALIAN JOHNSTON, MICHAEL RAE PAPAYANS, ANGELO FERRARA, FRANK FERRARA, CHARLIE FERRARA, and N.F.; CITY OF PALOS VERDES ESTATES; CHIEF OF POLICE JEFF KEPLEY, in his representative capacity; and DOES 1-10,

Defendants.

CASE NO.: 2:16-CV-2129-SJO-RAO
Hon. S. James Otero, Ctrm. 10C

DEFENDANT BLAKEMAN'S OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION of OCTOBER 30, 2017

CTRM: 10C
1st Street Courthouse

Action Commenced:	**03/29/2016**
Discovery Cutoff:	**08/17/2017**
Pretrial Conf.:	**10/23/2017**
Trial Date:	**11/07/2017**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs bring this ex parte as both a distraction and an excuse. This ex parte is a distraction from the actual issues in this case; it is an excuse for their failure to marshal evidence needed to overcome Brant Blakeman's meritorious motion for summary judgment[1]. Plaintiffs seek immediate relief to bring a motion under Rule 37(e) for the alleged destruction of text messages that were allegedly sent to Blakeman *prior to the date any duty to preserve attached*. Both the ex parte request and the underlying motion are meritless. It is respectfully requested that the ex parte relief be denied and the opportunity to file plaintiffs' frivolous motion for sanctions be foreclosed.

II. SUMMARY OF ARGUMENT

The issues in this case are limited to the events that occurred on January 29, 2016, a day that plaintiffs had a "bad time" at the beach.[2] ECF No. 382, p. 7:13-14. That day plaintiff Spencer sustained a tiny laceration from an unknown, third-party surfer and plaintiff Reed had beer suds spilled on her by co-defendant Johnson. Plaintiffs blame the entire community for their "bad time in Lunada Bay" in what was once a potential class action but has now been reduced to a simple assault, battery, public nuisance, negligence, and Bane Act case.

There are two requirements for ex parte relief: the moving party must not be at fault and they must be threatened by irreparable prejudice if the court does not immediately intervene. *Mission Power Engineering Co. v. Continental Cas. Co.* (C.D. Cal. 1995) 883 F.Supp. 488, 492; Standing Order, ¶23, EFC No. 9. This ex parte request fails on both counts.

Plaintiffs' ex parte application is fatally defective because they created their alleged crisis. Plaintiffs pretend they are at the mercy of the defendants for discovery efforts Plaintiffs never pursued. EFC No. 508-3, Page ID #18023. Plaintiffs never asked to examine Blakeman's phone and

[1] The Summary Judgment Motion filed by Mr. Blakeman for hearing August 21, 2017, remains pending as its original hearing date was suspended while Plaintiffs pursued discovery against other parties. That pursuit is now concluded. Meanwhile, the parties continue to expend vast resources preparing for the December 12, 2017 trial.

[2] Plaintiffs continue to advance the false and untrue argument that "February 5, 2016 [was] one of the days Plaintiffs were *harassed* at Lunada Bay." EFC 508-3, Page ID #18021. It is undisputed that Reed visited Lunada Bay with a Los Angeles Time photographer on February 5, 2016, without issue and did not encounter any surfers at the beach. ECF No. 1, Page ID # 14:6-8. She was not harassed.

they never requested an extraction report for the phone. Instead, they blame the City and Blakeman for not immediately cloning the phone and obtaining an extraction report *sua sponte*. "To show that the moving party is without fault, or guilty only of excusable neglect, requires more than a showing that the other party is the sole wrongdoer." *Mission Power Engineering Co., supra*, at 493. Plaintiffs cannot shift the blame to defendant when the initial burden to seek the discovery they need rests with them.

Plaintiffs placed themselves in this precarious position and now ask the Court to intervene, ex parte, to rescue them from their own creation. "Ex parte applications are not intended to save the day for parties who have failed to present requests when they should have...." *In re Intermagnetics America, Inc.*, supra, 101 B.R. at 193. "It is the creation of the crisis—the necessity for bypassing regular motion procedures—that requires explanation." *Id.* No explanation is given.

Plaintiffs also fail to make the requisite showing of prejudice. "A sliding scale is used to measure the threat of prejudice," --when the threat of prejudice is severe, a lesser showing of a likelihood of success on the merits is required and, inversely, if the prejudice is slight, a greater showing of a likelihood of success must be made. *Mission Power Engineering Co., supra*, at 493. Here, the prejudice is practically zero because any detriment for not having the content of the text messages at issue was purged by their production prior to the due date for Plaintiffs' supplemental opposition to summary judgment. Indeed, all of the text messages outlined in the motion were also showcased in their supplemental opposition. EFC No. 493, Page ID #17552-17553; EFC No. 508-3, Page ID #18021. An ex parte application is rightfully denied when there is an inadequate showing of prejudice.

The likelihood of success is also very low. Plaintiffs unsuccessfully tried this same motion against other co-defendants with *more* evidence of potential spoliation than they have against Blakeman. EFC No. 496, Page ID #17624-17625. Indeed, all they have here is that Blakeman did not produce "scores" of text messages that were allegedly sent to him on February 5, 2016[3], and an

[3] Plaintiffs continually refer to 500 pages of telephone records and "scores" of texts, however, they only produced 10 pages of records and about 21 text messages, i.e. one "score," potentially relevant to Blakeman, none substantively so. EFC No. 508-13. This is another example of the hyperbolic tone adopted by plaintiffs in this case.

alleged exchange on March 25, 2016, and April 12, 2016, with co-defendant Lee. It must be noted that all of these test messages occurred prior April 14, 2016, which is when Blakeman was served with the complaint. EFC No. 26, Page ID #197:3-4. Magistrate Oliver previously ruled that the date of service is the proper date for the duty to preserve to attach. EFC No. 496, Page ID #17615:4-5. Without a duty to preserve, the proposed motion under Rule 37(e) is meritless.

III. PROCEDURAL HISTORY

Plaintiffs filed their complaint on March 29, 2016, and this Court issued its standing order on March 31, 2016. EFC Nos. 1, 9, respectively. Since the inception of this lawsuit, plaintiffs have contended evidence related to cell phone were important to their case as well as maintaining that spoliation of evidence was occurring in not responding to discovery. EFC No. 1, ¶47; EFC No. 208-3, pgs. 36:23-2; EFC No. 233-3 pgs. 38:28 -39:3 and 47:3-8.

Discovery began on August 5, 2016, closed on August 7, 2017, and the motion cut-off was August 21, 2017. EFC No. 106, pgs. 2:23-4:3; FRCP Rule 26(d)), EFC No. 121. Plaintiffs had more than a year to engage in discovery. This Court's standing order is to diligently seek discovery in advance of deadlines. EFC No. 9, ¶ 19 and ¶ 20(c). Magistrate Oliver has altready found that plaintiffs were not diligent in seeking information related to City cell phones and declined to address plaintiffs' late request to obtain the cell phone used by Mr. Blakeman. EFC No. 471, pp.10-12.

Notably, plaintiffs complain that text messages produced by one party (Papayans) after the close of discovery, which cannot be authenticated[4] and are rife with hearsay, indicate that Mr. Blakeman spoliated evidence.[5] Plaintiffs conceal from this Court that despite Plaintiffs seeking such information from others since the inception of this litigation Plaintiffs never demanded an inspection

[4] Plaintiffs not only avoid FRE 901 but also avoid this Court's Standing order that stresses the necessity that documentary evidence be supported by testimony of a witness that can establish authenticity. EFC No. 9, ¶21(d). There is a significant chain of custody and hearsay issue with evidence that is not accompanied by a custodian's affidavit, testimony of its creation or transmission, or that it is cannot be challenged as it was produced after discovery was closed. This is in stark contrast to other defendants whos cellular devices have been examined by expert technicians who forensically extracted data.

[5] Plaintiffs cannot even point to one message that was sent by Blakeman of any substance (the only one is CB# and Blakeman's phone number), they only allege he received messages with no evidentiary support for such claims showing Blakeman actually received anything.

of the cell phone, never subpoenaed the phone records, and never pursued the records in discovery[6] despite knowing of this phone since November of 2016 when Mr. Blakeman was deposed. Plaintiffs avoid addressing the excessive overbreadth[7] of prior discovery requests, which were objected to on such basis, and conceal from the court their failing to ever pursue any further information related to such requests.[8] Plaintiffs ignore Magistrate Oliver's rulings indicating Plaintiffs were not diligent in seeking information on cell phones in the possession of the City.

IV. PLAINTIFFS' MOTION HAS NO MERIT

When examining alleged irreparable prejudice a Court should look to "the merits of the accompanying proposed motion, because if it is meritless, failure to hear it cannot be prejudicial." *Mission Power Eng'g Co., supra*, 883 F. Supp. at 492. In this case plaintiffs cannot show any admissible evidence of text messages.[9] Even if plaintiffs could authenticate the text messages there is no evidence of whether any information was or was not destroyed by Mr. Blakeman.[10] Even if there was evidence that information was lost or destroyed there is none indicating it was done after a duty preserve attached.[11] Even if the analysis were to proceed there is no evidence one way or the other of the alleged destruction of evidence.[12]

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[6] Plaintiffs admit they knew of text messages related to Blakeman as early as May 2017. See, EFC No. 508-4, ¶¶13, 18, and 19.

[7] Plaintiffs avoid explaining the defined terms that are used in their discovery requests that cause them to be grossly overbroad, i.e. "RELATING TO, "RELATED TO,""RELATES TO," or "REFERRING OR RELATING TO" means support, evidences, describes, mentions, refers to, comprises, constituting, containing, concerning, stating, mentioning, discussion, or in any other way being relevant to that given subject matter.

[8] Plaintiffs did on prior occasions seek to compel a response regarding these requests and Magistrate Oliver agreed with Mr. Blakeman that the requests were overbroad and adopted Mr. Blakeman's limits to the discovery requests. EFC No. 183, pgs.7-9 cf. EFC No. 212.)

[9] Ms. Wolff provides no factual information showing she can authenticate the document containing the alleged text messages. EFC No. 508-4, ¶20.

[10] Plaintiffs are simply unable to make such a determination as they never sought to examine the City cell phones and do not know if the information they seek ever existed on the devices, and if it did, when or how it was removed from the devices. This notably is important to whether there was a duty to preserve anything as well as to remedies available under Rule 37(e).

[11] All the identified text messages from Papayans occur before the complaint was filed.

[12] There is a significantly different remedy for unintentional versus intentional destruction of evidence under FRCP Rule 37(e)(1) and (e)(2).

Plaintiffs' motion has no merit. Plaintiffs conceded as much in the meet and confer process when they were unwilling to honor the Local Rules and confer in good faith.[13] Plaintiffs were unable to find more supportive information to seek issue or evidentiary sanctions against other parties and Magistrate Oliver has declined their invitation for such relief. EFC No. 496. The lack of irreparable prejudice is an independent basis to deny plaintiffs ex parte application.

V. PLAINTIFFS CREATED THE "CRISIS" THEY SEEK RELIEF FROM

This Court's standing order instructs the parties on how to approach litigation. It cautions parties to proceed with discovery in a manner to resolve discovery issues well in advance of the close of discovery. EFC No. 9, ¶ 19. This is also a primary tenet in addressing ex parte applications relating to whether or not the moving party bears any fault or is excused from any neglect in creating the "crisis."

As indicated earlier there is no explanation as to why plaintiffs, well aware of a cellular device used by one party and held by another, never sought the direct examination of the device. Plaintiffs ignored or disregarded this Court's admonishment to seek discovery well in advance of the discovery and motions cut-off. Plaintiffs have no explanation why they asserted, since the inception of this lawsuit, that information on cellular devices could allegedly prove their case but only sought limited information from such devices and then only at the end of discovery.[14]

Plaintiffs' own evidence contradicts their position that they did not create this "crisis." They admit awareness of the allegedly destroyed text messages in May of 2017. EFC No. 508-4, ¶13. Despite deposing Mr. Blakeman in November of 2016 and learning then of his City-issued cell phone, plaintiffs did not even begin to seek any information related to the City cell phone until May

[13] Plaintiffs initially invoked Local Rule 37-1 but would not provide the rationale or authority for the relief they sought. Plaintiffs were repetitively challenged to provide such information even after invoking Local Rule 7-3 asserting sanctions under Rule 37, then disavowing Rule 37, then re-invoking Rule 37. EFC No. 508-25; EFC No. 508508-28; EFC No. 508-29; EFC No. 508-30; EFC No. 508-31; EFC No. 508-32; EFC No. 508-33). Plaintiffs also would not meet in person and only provided a meeting place in San Francisco although Mr. Blakeman's counsel requested a meeting in Los Angeles, where this case is pending and where both firms representing plaintiffs have offices.

[14] Notably plaintiffs have been making allegations of spoliation since at least January of 2017 but never pursued discovery of City cell phones and never sought to extend discovery or to modify the Court's scheduling order. In fact, although further discovery was an available remedy under Rule 56(d), plaintiffs sought an outright denial of summary adjudication motions, just as they now seek extreme sanctions against Mr. Blakeman to distract from his pending motion for summary judgment.

of 2017. EFC No. 508-4, ¶¶14- 19. This is despite going to lengths to obtain other parties' cellular phones for forensic examination.

Plaintiffs have simply provided no evidence that this "crisis" is not of their own making. It is rather telling that instead of pursuing this information during discovery or any time up until today plaintiffs turn to evidentiary and issue sanctions to avoid the merits of the case.

VI. CONCLUSION

Given the low likelihood of success on the merits, the lack of actual prejudice, and the amount of delay in plaintiffs seeking the information that was allegedly spoiled, it is respectfully requested that the Court deny plaintiffs ex parte application and foreclose on the opportunity for plaintiffs to file their frivolous motion for sanctions.

Dated: November 1, 2017

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